IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

1.Central Excise Reference No. 5/2004
The Commissioner Central Excise and Customs Nagpur vs. The Customs Excise and Gold (Control) and another.

2.Central Excise Reference No. 1/2004
The Commissioner Central Excise & Customs Nagpur vs. The Customs Excise and Gold (Control) and another.

3.Central Excise Reference No. 2/2004
The Commissioner Central Excise, Nagpur vs. The Customs Excise and Gold (Control) Appellate Tribunal and another.

4.Central Excise Reference No. 3/2004
The Commissioner Central Excise & Customs, Nagpur vs. The Customs Excise and Gold (Control) Appellate Tribunal and another.

5.Central Excise Reference No. 4/2004
The Commissioner Central Excise and Customs Nagpur vs. The Customs Excise and Gold (Control) Appellate Tribunal and another.

Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders.	Court's or Judge's Orders.

CORAM : A.P. Lavande & R.V.More,JJ
DATE OF RESERVING : 8.10.2007
DATE OF PRONOUNCEMENT : 24.10.2007

Heard Mr. S.K.Mishra, learned Assistant Solicitor General for the applicant, Mr. M.G.Bhangde, learned Senior Counsel with Mr. V.V.Bhangde for respondent no.2 in all the references.

2. All these references are being disposed of by

the common order since they arise out of the common order dated 13.6.2003 passed by the Customs, Excise & Service Tax, Appellate Tribunal at Mumbai (“The CESTAT” for short) disposing of several appeals. The respondent no.2 were inter alia engaged in manufacture of Iron and Steel products and were availing modvat credit of duty paid on various capital goods under Central Excise Rules, 1944. The respondent no.2 availed of modvat credit on cement, steel plates and bars. The Commissioner, Central Excise, Nagpur issued notice calling upon to show cause as to why inadmissible credit taken by them on cement and steel plates and bars should not be disallowed and recovered from them under rule 57(U) of the Central Excise Rules, 1944. The Commissioner passed orders disallowing modvat credit on cement and steel bars and waste and also imposed penalty. Being aggrieved, the respondent no.2 filed appeal before the Customs, Excise and Gold (Control) Appellate Tribunal (“ The CEGAT” for short). The CESTAT disposed of the appeals involving common issue of eligibility of credit on cement, structural and other items under Rule 57 Q placing reliance upon the Judgment of the Apex Court in the case of Commissioner of C.EX, Coimbatore vs. Jawahar Mills Ltd. (2001 (132) E.L.T. 3 (S.C.) holding that the definition of capital goods is very wide. The capital goods can be machines, machinery,

plant equipment, apparatus, tools or appliances.

3. Mr. Mishra, the learned Assistant Solicitor General appearing for the revenue contended that the cement, steel plates and bars used in the construction of the building cannot be termed as capital goods under Rule 47 (q) of the Central Excise Rules, 1944 and, therefore, the respondent no.2 is not entitled to modvat credit. According to Mr. Mishra, the finding of the Tribunal that the respondent no.2 is entitled to modvat credit on cement, steel plates and bars is patently illegal and contrary to the several Judgments of the Apex Court and High Courts. In support of his submissions Mr. Mishra relied upon the following Judgments.

i) J.K.Cotton Spg. & Wvg. Mills Co. Ltd. versus Sales Tax Officer, Kanpur, 1997(91) E.L.T. 34 (S.C.);

ii) Jawahar Mills Ltd. vs. Commissioner of Central Excise, Coimbatore 1999(100) E.L.T. 47;

iii) Commissioner of C.Ex. Coimbator vs. Jawahar Mills Ltd.. 2001 (132) E.L.T. 3 (S.C.)

iv) Quality Steel Tubes Pvt. Ltd. vs. Collector of Central Excise, 1995(75)E.L.T. 17 (S.C.)

4. Per contra, Mr. Bhangde, learned senior counsel

at the outset submitted that in identical facts situation the revenue has conceded that the question raised has been decided against the revenue by the Apex Court in the case of Vikram Cement vs. Commissioner, Central Excise (2006 (194) E.L.T. 3 (S.C.). In support of his submission, Mr. Bhangde placed reliance upon the orders dated 13th June 2007 passed by this court in rejecting the Central Excise Appeal Nos. 74/04, 35/04, 36/04, 37/04 and 41/04. Mr. Bhangde further submitted that since in other matters involving identical issues the revenue has conceded and appeals have been dismissed the revenue is not entitled to challenge the orders passed by the CESTAT. In support of this submissions Mr. Bhangde relied upon the Judgment of the Apex Court in Jayanti Food Proceesing Pvt. Ltd. vs. Commissioner of Central Excise, Rajasthan (2007(10)SCALE 223. Mr. Bhangade submitted that on merits the CESTAT has recorded a finding of fact that the cement, steel plates and bars on which modvat credit has been granted have been used in the construction of the platform which is required for installing the machinery. According to Mr. Bhangde this is a pure finding of fact and as such question of making reference does not arise. Mr. Bhangde invited our attention to Rule 57 (q) which defines capital goods and submitted that the Tribunal was justified in holding that the assessee was entitled to

avail of modvat credit.

5. We have considered the submissions made by the counsel for the rival parties and perused the records and Judgments relied upon. In our opinion, the issue raised in the present reference is squarely covered by the Judgment of the Apex Court in Commissioner of Central Excise vs. Jawahar Mills Ltd.. (2001 (132) E.L.T. 3 (Supreme Court). In paragraphs 4 and 5 of the said Judgment, the Apex Court has observed as under:

> “4. The aforesaid definition of 'Capital goods' is very wide. Capital goods can be machines, machinery, plant, equipment, apparatus, tools or appliances. Any of these goods if used for producing or processing of any goods or for bringing about any change in any substance for the manufacture of final product would be 'Capital goods', and, therefore, qualify for availing Modvat credit. Per clause (b), the components, spare parts and accessories of the goods mentioned in clause (a) used for the purposes enumerated therein would also be 'Capital goods' and qualify for Modvat credit entitlement Clause © makes moulds and dies, generating sets and weigh bridges used in the

factory of the manufacturers as capital goods and thus qualify for availing Modvat credit. The goods enumerated in clause © need not be used for producing the final product or used in the process of any goods for the manufacture of final product or used for bringing about any change in any substance for the manufacture of final product and the only requirement is that the same should be used in the factory of the manufacturer. Thus, it can be seen that the language used in the explanation is very liberal.

5. In the case of Indian Farmers Fertilizer Cooperative Ltd. (supra) this court interpreted the notification which conferred exemption in respect of such raw naphtha as was used in the manufacture of ammonia provided such ammonia was used elsewhere in the manufacture of fertilizers. The facts of that case were that the appellant was manufacturer of urea – a fertilizer and utilized for that purpose raw naphtha. The question therein was whether ammonia used in the off-site plants was also ammonia which is " used elsewhere in the manufacture of fertilizers". The off-site plants were held to be part of the process of

the manufacture of urea. Relying upon the phraseology used in the exemption notification, it was held that there was no good reason why the exemption should be limited to the raw naphtha used for producing urea that is utilized directly in the urea plant since the notification only required that the ammonia should be used in the manufacture of fertilizers and not that it should be used directly in the manufacture of fertilizers. The Court said that:

> "The exemption notification must be so construed as to give due weight to the liberal language it uses. The ammonia used in the water treatment, steam generation and inert gas generation plants, which are a necessary part of the process of manufacturing urea, must, therefore, be held to be used in the manufacture of ammonia and the raw naphtha used for the manufacture thereof is entitled to the duty exemption."

6. The Tribunal has held that the cement, steel plates and bars in respect of which modvat credit has been availed of by respondent no.2 have been used for providing support to machines. This is a pure finding of fact recorded by the Tribunal which cannot be said to be

perverse and, therefore, binding. In view of the clear ratio laid down by the Apex in the case of Jawahar Mills Ltd. (supra) we find no illegality in the order passed by the Tribunal. Since the issue is squarely covered by the Judgment of the Apex Court in the case of Jawahar Mills Ltd., in our opinion, no substantial question of law is involved in the present references. On this ground only the references are deserved to be rejected. We do not deem it necessary to deal with the other submissions made by the learned counsel for the parties.

In view of the above, all the references are rejected.

Judge **Judge**

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